Supreme Court, U.S.
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No. 02 461 SEP 16 2002

In The

Supreme Court of the United States

OCTOBER TERM, 2002

VERONIQUE MARTY, NATHALIE ROYOT, and CELINE MOGUEN,
Petitioners

v.

THE SUPREME COURT OF LOUISIANA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION OF VERONIQUE MARTY, NATHALIE ROYOT, AND CELINE MOGUEN FOR A WRIT OF CERTIORARI

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September 13, 2002

HOPP

QUESTIONS PRESENTED

1. Does the decision and order of the Supreme Court of Louisiana and its selective enforcement of the "resident alien" clause of Section 3(B) of Art. XVII of the rules for admission to the Bar of the State of Louisiana, establish a conflict with a decision of the highest court of Vermont in *Dingemans v. Board of Bar Examiners*, 152 Vt. 494; 568 A.2d 354 (Vt. 1989), with applicable decisions of this Court in, *inter alia*, *In Re Griffiths*, 413 U.S. 717; 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973); *Plyer v. Doe*, 457 U.S. 202; 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *Elkins v. Moreno*, 435 U.S. 647; 98 S. Ct. 1338; 55 L. Ed. 2d 614 (1978); *Toll v. Moreno*, 458 U.S. 1; 102 S. Ct. 2977; 73 L. Ed. 2d 563 (1982); *Nyquist v. Mauclet*, 432 U.S. 1; 97 S. Ct. 2120; 53 L. Ed. 2d 63 (1977); and *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419; 68 S. Ct. 1138, 1142-43; 92 L. Ed. 1478 (1948), as well as with the bar admission requirements of every other state of the United States, none of whom discriminates against lawful nonimmigrant aliens such as petitioners?

2. Were the decision and order of the Supreme Court of Louisiana dated June 13, 2002, which denied Richard John Bourke's request for permission to take the Louisiana Bar examination and overruled the settled jurisprudence of that court together with the previous orders of that court similarly denying petitioners' applications, entered in violation of the constitutional due process rights of petitioners, "persons" within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1981 and 1983, and their entitlement to a hearing, the presentation of evidence, and the disclosure of whatever information and recommendations were presented to the Louisiana Supreme Court by the Louisiana State Bar Association Committee on Admissions or others?

3. Was the denial of the various petitions filed by petitioners and the refusal to permit them to sit for the Louisiana State Bar examination an improper attempt to establish immigration policy under circumstances in which the establishment and implementation of immigration policy is exclusively reserved to the United States of America by Article I, § 8 of the United States Constitution and is it contrary to the terms of the H-1B visa granted to Royot, which visa enables her, although nonimmigrants, to seek admission to practice law in Louisiana under the same conditions imposed on all other applicants and no other (such as permanent immigrant residence) as well as contrary to the J-1 visas issued to Marty and Moguen?

4. Is Section 3(B) of Rule XVII of the Rules of the Louisiana Supreme Court unconstitutional as a denial of due process and the equal protection of the law to the extent that it has been interpret to discriminate against nonimmigrant aliens lawfully admitted and employed in the United States, which has been determined to be a suspect class? Is discrimination under state law against such a suspect class subject to strict scrutiny, so that the state authority establishing and enforcing such a discriminatory provision must show a compelling need, not here shown or offered, why nonimmigrant aliens lawfully in the United States should be treated differently from either citizens, resident aliens, or nonimmigrant LLM students with regard to admission to the Bar of the State of Louisiana?[1]

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[1] The suspect class has been de facto further restricted to persons who have not received an LLM degree, since LLM recipients, even those who hold only nonimmigrant visas, have routinely sat for the Louisiana Bar examination and have not been excluded from practicing law in Louisiana.

PARTIES TO THIS PROCEEDING

Petitioners are Véronique Marty, Nathalie Royot, Céline Moguen, petitioners in various proceedings filed as original proceedings in the Supreme Court of Louisiana seeking permission to sit for the Louisiana State Bar Examination.

Respondent is the Supreme Court of Louisiana, the highest court of the State of Louisiana and the promulgator and interpreter of Section 3(B) of Rule XVII of the Rules of that court, which rule governs admissions to the Bar of the State of Louisiana and has been interpreted by that court to exclude from admission to the Louisiana State Bar Association non-resident aliens lawfully admitted to the United States to live and work.

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Petitioners respectfully petition for a writ of certiorari to review the orders and opinions in the Supreme Court of Louisiana denying them permission to take the Louisiana Bar Examination and denying rehearing and/or reconsideration.

OPINIONS BELOW

The decisions of the Louisiana Supreme Court denying permission to petitioners and to Richard John Bourke[2] for permission to take the Louisiana State Bar Examination appear at App. A-E and are reported at 809 So.2d 974 (La. 2002); 2002 La. LEXIS 1416 (La. 2002); 2002 La. LEXIS 1418 (La. 2002); 2002 La. LEXIS 1434 (La. 2002), and 2002 La. LEXIS 1863 (La. 2002). The denials of rehearing/reconsideration (App. F-G) are reported at 820 So.2d 565 (La. 2002).

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1257(a), 2101(c). The Supreme Court of Louisiana rendered the decisions below on February 15, 2002, April 26, 2002, and June 13, 2002. Rehearing/reconsideration was denied on July 9, 2002.

STATUTE (RULE) INVOLVED

Section 3(B) of Art. XVII of the rules for admission to the Bar of the State of Louisiana states as follows:

> Every applicant for admission to the Bar of this state shall meet all of the following requirements:
>
> * * * *
>
> (B) Be a citizen of the United States or a resident alien thereof.

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[2] Mr. Bourke is separately represented and will be filing his own petition for certiorari.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

A. Statement of the Facts and the Proceedings Below

Petitioners, Véronique Marty and Céline Moguen,[3] are citizens of France who have been lawfully residing and working in the United States pursuant to a J-1 visa. Petitioner, Nathalie Royot is a citizen of France, who has been lawfully residing and working in the United States pursuant to an H-1B visa.

Each of petitioners has met or can meet all of the requirements for admission to the Bar of the State of Louisiana other than the status of citizen or resident alien within the meaning of § 3(B) of Rule XVII as interpreted by the Louisiana Supreme Court. Nathalie Royot applied for permission to take the February, 2002 and July, 2002 Louisiana Bar Examinations. All of the other petitioners applied for permission to take the July, 2002 Louisiana Bar Examination. After the June 13, 2002 decision of the Louisiana Supreme Court denying the application of Robert John Bourke, petitioners filed an application for reconsideration and as *amicus* curiae in support of the Bourke petition for rehearing. All such applications and petitions for reconsideration/-rehearing have been denied.

The unlawful discrimination against granting non-immigrant aliens admission to the Bar of the State of Louisiana is further exacerbated by the fact that non-immigrant aliens who have received an LLM from Tulane University School of Law are not now and have not been denied permission to take the Louisiana State Bar Examination or denied admission to the Louisiana State Bar

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[3] Céline Moguen is now lawfully residing in the United States under an F-1 visa.

Association, but rather have become practicing member of the Bar of the State of Louisiana.

Richard John Bourke is a foreign-lawyer employee of The Justice Center and of the Louisiana Crisis Center, which are directed by Clive Stafford Smith, an English death penalty attorney, who, as a non-resident alien, was permitted to take the Louisiana Bar examination in *Application of Stafford Smith*, 452 So.2d 697 (La. 1984) and was subsequently admitted to the Louisiana Bar. His worldwide fame is noted at http:/www.kcl.ac.uk/depsta/law/lawnews/main_news – Law School:Archive. His relationship with Reprieve Australia and Richard Bourke is documented at http:/reprieve.org.uk/Australia/press.html.

As may be seen from the following selection of cases handled by Clive Stafford Smith, his work and that of his associates have been devastatingly effective in the Supreme Court of Louisiana. Although this is never referenced in any of the opinions or decisions of the Louisiana Supreme Court, it seems apparent that this court was willing to reverse its own prior jurisprudence in order to prevent volunteer attorneys, such as Mr. Bourke, from becoming licensed in Louisiana and that petitioners were simply caught in the crossfire.

Citation	**Outcome**
State of Louisiana vs. Edward Irvin Harris, 820 So.2d 471 (La. 06/21/02)	Defendant was convicted of two counts of first degree murder. Defendant was sentenced to death. On appeal, defendant argued that the State improperly exercised peremptory challenges on the basis of race. The supreme court reversed and remanded defendant's conviction and sentence.

State of Louisiana vs. Lawrence J. Jacobs, Jr. , 789 So. 2d 1280 (La. 06/29/01)	Defendant was convicted of first degree murder and sentenced to death. The supreme court reversed and remanded.
State of Louisiana v. Shareef Cousin, 710 So.2d 1065 (La. 04/14/98)[4]	Defendant was convicted of first degree murder. The supreme court reversed defendant's conviction of first degree murder and the sentence imposed.
State of Louisiana vs. Donald Gene Cousan, 684 So.2d 382 (La. 11/25/96)	Defendant was convicted of first degree murder. The conviction was affirmed by the supreme court, but the death sentence was vacated and set aside. The case was remanded to the district court for a new sentencing hearing.
State of Louisiana vs. Dan L. Bright, 776 So.2d 1134 (La. 04/11/00)	Defendant appealed his first degree murder conviction and death sentence. The supreme court set aside defendant's first degree murder conviction and death sentence and modified the conviction to second degree murder. The court remanded for the trial court to sentence defendant to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence.
State of Louisiana	Defendant was found guilty of first-

[4] This was a very controversial case with substantial pretrial publicity.

vs. Derek Landry, 751 So.2d 214 (La. 06/29/99)	degree murder and sentenced to death. Defendant appealed the conviction on multiple grounds, including the deficiency of the record rendering his appeal meaningless. The supreme court reversed and remanded defendant's conviction and sentence for a new trial because the appellate record was so deficient that the court could not properly review the case for error.
State of Louisiana vs. William G. Hamilton, 699 So.2d 29 (La. 07/01/97)	Defendant's conviction for first degree murder was affirmed by the supreme court, and defendant's sentence of death was vacated and set aside, and the case was remanded to the district court for a new sentencing hearing.

B. The Consequences of the Decision Below

The opinions and orders of the Supreme Court of Louisiana have caused it to deviate from the admissions requirements of every other state of the United States and to overrule the prior jurisprudence of that court in which it had ruled, on account of constitutional considerations, that the term "resident alien" included all those who were aliens lawfully residing in the United States under the terms of a visa granted by the United States.

REASONS FOR GRANTING THE WRIT

The Decision of the Supreme Court of Louisiana on an important Constitutional Question, Conflicts with a Decision of the Highest Court of the State of Vermont, and Decisions of This Court.

A. The Issue as Framed by the Supreme Court of Louisiana[5]

However, it is undisputed that petitioner in the instant case is a holder of a non-immigrant visa who is not entitled to live and work in the United States permanently. Petitioner has cited no authority which would indicate that an alien temporarily residing in the United States is entitled to the same constitutional protections with regard to admission to the bar as a permanent resident alien.

With reference to the parameters of equal protection expressed by the Court in *Griffiths*, we interpret the term "resident alien," as used in Supreme Court Rule XVII, § 3(B), as applying only to those aliens who have attained permanent resident status in the United States. To the extent that our prior decisions, including *In re: Application of Appert*, 444 So.2d 1208 (La. 1984), and *In re: Application of Respondek*, 442 So.2d 435 (La. 1983), conflict with this holding, they are hereby overruled.

In sum, we find petitioner, who is not a United States citizen nor a permanent resident alien, does not satisfy the qualifications for admission to the Louisiana bar set forth in Supreme Court Rule XVII, § 3. Accordingly, his application to sit for the Louisiana bar examination is denied.

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[5] App. E., pp. 4a-3a.

B. The Dissent of Chief Justice Calogero[6]

I disagree with the majority's opinion that petitioner must be a United States citizen or must have attained permanent resident status in the United States to meet the requirements for admission to the Louisiana bar. This court has recently addressed a similar issue, and at least two justices were in favor of appointing a committee to study the issue and perhaps make a recommendation to this court to clarify the law. *In re: Nathalie Royot*, 02-0969 (La. 4/26/02), __ So.2d __, 2002 La. LEXIS 1416; *In re: Veronique Marty, Celine Moguen, and Youcef El Maouhab*, 02-0325 (La. 4/26/02), __ So.2d __, 2002 La. LEXIS 1418. The court's action today illustrates the necessity for such a committee.

In *In re: Appert*, 444 So.2d 1208 (La. 1984) and *In re: Application of Respondek*, 442 So.2d 435 (La. 1985), we held that "resident alien" referred to an alien that was lawfully residing in the United States. I see no reason to overrule this prior jurisprudence, as the majority is now doing. Therefore, because petitioner is lawfully residing in the United States, I would consider him a "resident alien" as required by Supreme Court Rule XVII, § 3(B), and I would grant petitioner's application to sit for the Louisiana bar exam.

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[6] App. E., pp. 5a-6a. Please note that this Court recently agreed with a written dissent of Chief Justice Calogero on a constitutional issue in *Kirk v. Louisiana*, No. 01-8419 (June 24, 2002).

ARGUMENT

I.
NONIMMIGRANT ALIENS ARE PERSONS

It is well established that nonimmigrant aliens are "persons" within the meaning of the meaning of the Fifth[7] and Fourteenth Amendments[8] to the United States Constitution, and 42 U.S.C. §§ 1981 and 1983.

The unlawful discrimination against petitioners is contrary to the decisions of this Court in *Plyer v. Doe*, 457 U.S. 202; 210, 102 S. Ct. 2382, 2391; 72 L. Ed. 2d 786 (1982) (involving discrimination against undocumented school aged children); *Elkins v. Moreno*, 435 U.S. 647; 98 S. Ct. 1338; 55 L. Ed. 2d 614 (1978) (discussing persons admitted under G-4, a nonimmigrant visa); *Toll v. Moreno*, 458 U.S. 1; 102 S. Ct. 2977; 73 L. Ed. 2d 563 (1982) (invalidating discrimination against the holder of a G-4 nonimmigrant visa); *Nyquist v. Mauclet*, 432 U.S. 1; 97 S. Ct. 2120; 53 L. Ed. 2d 63 (1977) (state bar against resident aliens receiving financial assistance for college unconstitutional); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419; 68 S. Ct. 1138, 1142-43; 92 L. Ed. 1478 (1948) (application of the precodification 42 U.S.C. § 1981 to aliens statutorily ineligible for citizenship); and *In Re Griffiths*, 413 U.S. 717, 719; 93 S. Ct. 2851, 2853; 37 L. Ed. 2d 910 (1973) (resident alien); as well as decisions of lower federal courts, *Tayyari v. New Mexico State University*, 495 F.Supp. 1365, 1372 (D.N.M. 1980) (nonimmigrant aliens) and *Szeto v. The Louisiana State Board of Dentistry*, 508 F.Supp. 268 (EDLA 1981) (overturning prohibition against practice of dentistry by resident alien); and the supreme courts of other states,

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[7] App. H, p. 8a.

[8] App. H, p. 8a.

Dingemans v. Board of Bar Examiners, 152 Vt. 494; 568 A.2d 354 (Vt. 1989) (bar admission could not be denied to non-immigrant alien with H-1B visa) and *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (Fla. 1989) (non-resident alien dependents could not be discriminated against in regard to death benefits). See *Bhandari v. First National Bank of Commerce*, 494 U.S. 1061; 110 S. Ct. 1539; 108 L. Ed. 2d 778 (1990) (dissent of White, private discrimination under 42 U.S.C. § 1981).

II.
PETITIONERS WERE WRONGFULLY DEPRIVED OF A HEARING

Under the constitutional and statutory provisions hereinabove cited, petitioners and all of the other current applicants for permission to take the Louisiana Bar examination are entitled to a hearing, the presentation of evidence to prove their allegations that Louisiana is the only state with such a wrongfully discriminatory policy and that non-resident alien LLM students took and passed the Louisiana Bar examination and are admitted to practice, and to the disclosure of whatever information and recommendations were presented to the Louisiana Supreme Court by the Louisiana State Bar Association Committee on Admissions. Other than the denials of their petitions and the one Per Curiam, there was no public response to the petitions filed with the Louisiana Supreme Court and the responses made by the Louisiana State Bar Association Admissions Committee and others were kept secret.

The June 13, 2002 Per Curiam decision of the Louisiana Supreme Court, which, without an opportunity to respond to the overruling of its prior *jurisprudence constante* that permitted applicants with the same qualities and qualifications as petitioners to be admitted to the Louisiana

Bar, denied the relief sought by Bourke and the petitioners, also denied them their due process rights under the United States Constitution of fair notice and an opportunity to be heard. *Board of Regents v. Roth*, 408 U.S. 564; 92 S. Ct. 2701; 33 L. Ed. 2d 548 (1972). Please see *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232; 77 S. Ct. 752; 1 L. Ed. 2d 796 (1957) (the use by the Board of Examiners of confidential information and of certain allegations of past conduct to deny a license for the practice of law was a deprivation of due process) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-103; 83 S. Ct. 1175, 1179-80; 10 L. Ed. 2d 224 (1963) (Due process specifically extended to the bar admission process so that applicant was entitled to notice of and a hearing on the grounds for rejection.); and *Tayyari v. New Mexico State University*, 495 F.Supp. 1365, 1375 (D.N.M. 1980) (the nonimmigrant plaintiffs' claim that they received neither notice nor an opportunity to be heard was not considered because the Regents' actions could not withstand scrutiny on the basis of equal protection).

III.
PREEMPTION BY THE PLENARY POWER OF THE FEDERAL GOVERNMENT TO SET IMMIGRATION POLICY

Pursuant to Article I, § 8[9] of the United States Constitution, the Congress of the United States has the exclusive power to establish rules governing immigration, foreign policy, and the rights of non-citizens. This power is binding on the states on account of the Supremacy Clause, Art. VI.[10] *Plyer v. Doe*, 457 U.S. at 225, 102 S. Ct. at 2399;[11]

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[9] App. H, p. 10a.

[10] App. H, p. 10a.

and *Takahashi*, 334 U.S. at 418-419; 68 S. Ct. at 1142 (striking down a California law prohibiting Japanese residents who were not eligible for citizenship from earning a living as commercial fishermen).

The rule denying permission to nonimmigrant aliens to sit for the Louisiana Bar Exam also violates the Supremacy Clause. This Court has made it clear that:

> [a]ny state regulation that is not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.

De Canas v. BICA, 424 U.S. 351, 358, n. 6; 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).

Please see the extensive discussion in *Tayyari*, 495 F.Supp. at 1376-1379 (immigration subsumed under the general topic of foreign affairs, so that a state attempt to discriminate against nonimmigrants was preempted. Moreover, discrimination against nonimmigrants was improper even if hostility against certain nonimmigrants had risen "to the level of xenophobia," just as may be the situation after the tragic events of 9/11.)

There is no analogous discrimination against citizens of the various member states of the European Union, who may move their legal practices from one member state to another. *Gebhard v Consiglio Dell'Ordine Degli Avvocati E Procurator Di Milano* (Cast C-55/94), All ER (EC) 189, [1996] 1 CMLR 603 (Court of Justice of the European Communities 1996).

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[11] See concurrence of Powell, *Plyer v. Doe*, 457 U.S. at 238, n.1, 102 S. Ct. at 2406.

IV.
NONIMMIGRANT ALIENS ARE A SUSPECT CLASS AS TO WHICH ANY STATE ENACTMENT TREATING THEM UNEQUALLY ON THE BASIS OF MEMBERSHIP IN THAT CLASS IS STRICTLY CONSTRUED SO THAT THE BURDEN IS SHIFTED TO THE STATE TO JUSTIFY THE DISCRIMINATION OR UNEQUAL TREATMENT

A. Nonimmigrant Aliens Are a Suspect Class

In *In Re Griffiths*, 413 U.S. at 721; 93 S. Ct. at 2854-55, the holding in *Takahashi* was characterized as follows:

> But the doctrinal foundations of *Clarke* were undermined in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), where, in ruling unconstitutional a California statute barring issuance of fishing licenses to persons "ineligible to citizenship," the Court stated that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Id.*, at 420. Indeed, with the issue squarely before it in *Graham v. Richardson*, 403 U.S. 365 (1971), the Court concluded:
>
> > "Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate." *Id.*, at 372. (Footnotes omitted.)

Please see *Examining Board of Engineers, Architects and Surveyors v. De Otero*, 426 U.S. 572, 601-602; 96 S. Ct. 2264, 2281; 49 L. Ed. 2d 65 (1975) (involving an effort to

exclude aliens from the practice of engineering and discussing official discrimination against lawfully admitted aliens).

See *Sugarman v. Dougall*, 413 U.S. 634; 93 S. Ct. 2842; 37 L. Ed. 2d 853 (1973) (New York Civil Service law excluding aliens as a class was unconstitutional); *Bernal v. Fainter*, 467 U.S. 216; 104 S. Ct. 2312; 81 L. Ed. 2d 175 (1984) (Texas statute depriving aliens of the right to become notaries public was unconstitutional).

In *Tayyari*, 495 F.Supp., at 1371-72, nonimmigrants were the target of an attempt by the university to exclude Iranian nationals during the Iranian hostage crisis. However, as here:

> No rationale has been presented by Defendants for distinguishing among aliens according to their immigrant status except that Defendants admit they believe the Motion could not constitutionally be applied to these immigrant aliens.

The *Tayyari* court, 495 F.Supp., at 1372, found that, "Alienage has been treated under modern equal protection analysis as a suspect classification, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), thus invoking strict judicial scrutiny of a state's challenged action. n7" See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100; 96 S. Ct. 1895, 1903-04; 48 L. Ed. 2d 495 (1976) (striking down a civil service ban against aliens).

Although this Court held in *Plyer v. Doe*, 457 U.S. at 228, 102 S. Ct. at 2400 that undocumented aliens were not to be treated as a suspect class, it held that:

> The State must do more than justify its classification with a concise expression of an intention to discriminate. *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976).

* * * *

> A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State.

B. Level of Scrutiny to Be Given to Section 3(B)

Section 3(B) should be subject to strict scrutiny. This, according to the *Griffiths* court, 413 U.S. at 721-22; 93 S. Ct. at 2855, means:

> The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin v. Florida,* 379 U.S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible n8 and substantial, n9 and that its use of the classification is "necessary . . . to the accomplishment" of its purpose n10 or the safeguarding of its interest. n11 [footnotes omitted.]

In *Bernal v. Fainter*, 467 U.S., 220; 104 S. Ct., 2316, this Court, in applying "strict scrutiny" to a law excluding aliens commented in note 6 that:

> Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is "strict" in theory but usually "fatal" in fact. Gunther, The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model

for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

The Supreme Court of Louisiana has shown no compelling state interest in excluding nonimmigrant aliens from admission to its bar, even when they are death-penalty lawyers, and made no attempt to do so.

C. Section 3(B) Cannot Withstand a Strict Scrutiny or Any Other Constitutional Analysis

The *Takahashi* court was unable to find any "special public interest" on which California could rely in order to support or justify discrimination based on nonimmigrant alienage, 334 U.S. at 420; 68 S. Ct. at 1143.

The *Griffiths* court concluded that the bar admission committee had not carried its burden of justification, 413 U.S. at 721-22; 93 S. Ct. at 2855, and concluded that the provision violated the Equal Protection Clause. As in *Tayyari*, 495 F.Supp. at 1373, "None of the reasons offered by Defendants for their action rises to that level of compelling state interest which withstands strict scrutiny."[12] Compare *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274; 105 S. Ct. 1272; 84 L. Ed. 2d 205; (1985) and *Frazier v. Heebe*, 482 U.S. 641; 107 S. Ct. 2607; 96 L. Ed. 2d 557 (1987).

Even if the discrimination against Bourke and petitioners solely because they are nonimmigrant aliens is not subject to strict scrutiny, the Louisiana Supreme Court has not attempted to justify this discrimination. Consequently, even under the lesser standard applied in *Plyer v. Doe*, 457 U.S. at

[12] Here, of course, the decision and order of the Louisiana Supreme Court of June 13, 2002 contains no reasoning, but applies Section 3(B) without explanation against non-LLM alien nonimmigrant applicants seeing permission to sit for the bar exam.

227-288, 102 S. Ct. at 2400 to undocumented and presumably illegal aliens, it cannot be justified because:

> strict scrutiny under the Equal Protection Clause is unnecessary when classifications infringing enumerated constitutional rights are involved, for "a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications.[13]

Please see *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997), "Finally, the State's public education expenditures for the children of undocumented aliens are required by the equal protection clause rather than by actions of the federal defendants."

V.
THE DECISION OF THIS COURT RESULTS IN A CONFLICT WITHIN RULE X OF THE RULES OF THIS COURT WITH THE HIGHEST COURT OF ANOTHER STATE

The decision of the Louisiana Supreme Court and its enforcement of Section 3(B) establish a conflict with applicable decisions of this Court, as discussed above, and with a decision of the highest court of Vermont as well as with the admission requirements of every other state of the United States, none of which discriminates against nonimmigrant aliens such as petitioners.

The decision of the Supreme Court of Vermont in *Dingemans v. Board of Bar Examiners*, 152 Vt. 494; 568 A.2d 354 (Vt. 1989) dealt, as does the Royot case, with the

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[13] See concurrence of Marshall, *Plyer v. Doe*, 457 U.S. at 231, 102 S. Ct. at 2402.

application for admission of a person holding an H-1B visa as a legal consultant, and its result is exactly opposite to that reached by the majority of the Louisiana Supreme Court in the *Bourke* decision. There the plaintiff was lawfully working in Vermont under an H-1B visa and had sat for and passed the Vermont bar examination but was refused admission because she was neither a citizen nor an alien who had been admitted for permanent residence.

The court found that, "the federal immigration program contemplates that a nonresident immigrant attorney may engage in the practice of law in this country, see *8 U.S.C. § 1101*(a)(32)[14] . . ." *Dingemans*, 568 A.2d at 356. It therefore concluded that the Vermont rule, "insofar as it denies admission to the Vermont bar strictly on grounds of the alien status of an individual, constitutes a burden on the federal immigration program and thus violates the Supremacy Clause of the United States Constitution." *Dingemans*, 568 A.2d at 357.

There is no reason, of course, to make a distinction between the various types of nonimmigrant visas, so that the same rationale should be applicable to the "J-1" visas held by Marty and Moguen.

CONCLUSION

The decisions and orders of the Louisiana Supreme Court denying the applications of petitioners to sit for the July 2002 Louisiana Bar Examination are deficient as a matter of due process and fundamental fairness. There was no attempt to subject § 3(B) to strict scrutiny. Rather there was a failure to

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[14] **(32)** The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

provide any justification for the discrimination against Royot, a nonimmigrant alien lawfully able to practice law under an H-1B visa, and Marty and Moguen, nonimmigrant aliens lawfully able to practice law under a J-1 visa, when there is no such discrimination against citizens or resident aliens, or against non-resident, nonimmigrant aliens, who have received an LLM degree.

For all these reasons, Petitioners requests that this Court grant their Petition for Certiorari, reverse the decisions of the Louisiana Supreme Court, and order that petitioners have met the requirements of Rule XVII, § 3(B) of the Louisiana Supreme Court's Rules of Admission of the Bar of the State of Louisiana.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE SUPREME COURT OF LOUISIANA DATED 2/15/02

In Re: Royot, 2002-0518 (La. 02/15/02); 809 So.2d 974

PRIOR HISTORY: IN RE: Royot, Nathalie; - Plaintiff; Applying for Permission to Take Bar Examination.

JUDGES: Catherine D. Kimball, Pascal F. Calogero, Jr., Jeffrey P. Victory, Chet D. Traylor, Jeannette Theriot Knoll, John L. Weimer.

OPINION: Denied.

APPENDIX B -- OPINION OF THE SUPREME COURT OF LOUISIANA DATED 4/26/02

In Re: Royot, 02-0969 (La. 04/26/02); 2002 La. LEXIS 1416

DISPOSITION: Concurring and dissenting opinons reported.

OPINION: APPLICATION FOR PERMISSION TO TAKE THE BAR EXAM DENIED.

JOHNSON, J., concurs in the denial of this petition but writes separately to say that she is in favor of appointing a committee to study the issue.

CALOGERO, C. J. would allow applicants to take the bar examination and, if successful, be admitted thereafter only if and when this court should change the rule after appointing a committee to make a recommendation in this regard.

APPENDIX C -- OPINION OF THE SUPREME COURT OF LOUISIANA DATED 4/26/02

In Re: Marty, 02-0325 (La. 04/26/02); 2002 La. LEXIS 1418

DISPOSITION: Applications denied.

OPINION: APPLICATIONS FOR PERMISSION TO TAKE THE BAR EXAM DENIED.

JOHNSON, J. concurs in the denial of these petitions but writes separately to say that she is in favor of appointing a committee to study the issue.

CALOGERO, C. J. would allow applicants to take the bar examination and if successful, be admitted thereafter only if and when the court should change the rule after appointing a committee to make a recommendation in this regard.

APPENDIX D -- OPINION OF THE SUPREME COURT OF LOUISIANA DATED 4/26/02

In Re: Marty, 2002-0325 (La. 04/26/02);2002 La. LEXIS 1434

OPINION: Denied.

CALOGERO, C.J., would allow applicants to take the bar examination and if successful, be admitted thereafter only if and when this court should change the rule after appointing a committee to make recommendation in this regard.

JOHNSON, J., concurs in the denial of the petitions but writes separately to say that she is in favor of appointing a committee to study the issue.

APPENDIX E -- OPINION OF THE SUPREME COURT OF LOUISIANA DATED 6/13/02

In Re: Bourke, 2002-1468 (La. 06/13/02); 2002 La. LEXIS 1863

OPINION: PER CURIAM

This matter arises from a petition by Richard John Bourke, a citizen of Australia, n1 requesting that he be allowed to sit for the Louisiana bar examination. For the reasons that follow, we deny the petition.

--Footnotes--

n1 Petitioner graduated from the University of Melbourne Law School in Melbourne, Australia, and has been admitted to practice as a barrister and solicitor in the courts of Australia since 1995.

--EndFootnotes--

UNDERLYING FACTS

In July 2001, petitioner filed an application to take the Louisiana bar examination. At the time he submitted the application, petitioner resided in Australia. The Committee on Bar Admissions subsequently notified petitioner that he would not be permitted to sit for the bar exam because he is neither a citizen of the United States nor a resident alien thereof, as required by Supreme Court Rule XVII, § 3(B). n2 However, the Committee advised petitioner [*2]that if he could demonstrate he was a "resident alien," his application would be reconsidered.

--Footnotes--

n2 Supreme Court Rule XVII, § 3 states in pertinent part:

Every applicant for admission to the Bar of this state shall meet all of the following requirements: . . .

(B) Be a citizen of the United States or a resident alien thereof.

--EndFootnotes--

In 2002, petitioner arrived in the United States on an H-1B visa, a non-immigrant visa that enables him to work in this country in a professional capacity on a temporary basis. n3 He currently resides in New Orleans, where he is employed by a non-profit legal organization. Thereafter, petitioner sought reconsideration of the Committee's ruling, asserting that he was now a "resident" of this country. The Committee denied petitioner's request, on the ground that the term "resident alien," as used in Rule XVII, § 3(B), applies to aliens who have been granted permanent resident status in the United States, not those who are merely residing in the country on a temporary basis.

--Footnotes--

n3 Petitioner's visa is valid until January 1, 2005.

--EndFootnotes--

[*3]

Petitioner then applied to this court, seeking permission to sit for the Louisiana bar examination.

DISCUSSION

In *In re Griffiths*, 413 U.S. 717, 37 L. Ed. 2d 910, 93 S. Ct. 2851 (1973), the United States Supreme Court held that under the Fourteenth Amendment, an alien who was legally entitled to reside in the United States on a permanent basis could not be denied admission to the bar solely based on her status as an alien. However, it is undisputed that petitioner in the instant case is a holder of a non-immigrant visa who is not entitled to

live and work in the United States permanently. Petitioner has cited no authority which would indicate that an alien temporarily residing in the United States is entitled to the same constitutional protections with regard to admission to the bar as a permanent resident alien.

With reference to the parameters of equal protection expressed by the Court in *Griffiths*, we interpret the term "resident alien," as used in Supreme Court Rule XVII, § 3(B), as applying only to those aliens who have attained permanent resident status in the United States. To the extent that our prior decisions, including *In re: Application of Appert* , 444 So.2d 1208 (La. 1984),[*4] and *In re:Application of Respondek*, 442 So.2d 435 (La. 1983), conflict with this holding, they are hereby overruled.

In sum, we find petitioner, who is not a United States citizen nor a permanent resident alien, does not satisfy the qualifications for admission to the Louisiana bar set forth in Supreme Court Rule XVII, § 3. Accordingly, his application to sit for the Louisiana bar examination is denied.

CALOGERO, Chief Justice, dissents and assigns the following reasons:

I disagree with the majority's opinion that petitioner must be a United States citizen or must have attained permanent resident status in the United States to meet the requirements for admission to the Louisiana bar. This court has recently addressed a similar issue, and at least two justices were in favor of appointing a committee to study the issue and perhaps make a recommendation to this court to clarify the law. *In re: Nathalie Royot*, 02-0969 (La. 4/26/02), __ So.2d __, 2002 La. LEXIS 1416; *In re: Veronique Marty, Celine Moguen, and Youcef El Maohab*, 02-0325 (La. 4/26/02), __ So.2d __, 2002 La. LEXIS 1418. The court's action today illustrates the necessity for such a committee.

In *In re:* [*5]*Appert*, 444 So.2d 1208 (La. 1984) and *In re: Application of Respondek*, 442 So.2d 435 (La. 1985), we held that "resident alien" referred to an alien that was lawfully residing in the United States. I see no reason to overrule this prior jurisprudence, as the majority is now doing. Therefore, because petitioner is lawfully residing in the United States, I would consider him a "resident alien" as required by Supreme Court Rule XVII, § 3(B), and I would grant petitioner's application to sit for the Louisiana bar exam.

APPENDIX F -- OPINION OF THE SUPREME COURT OF LOUISIANA DATED 7/09/02 DENING REHEARING

In Re: Royot, 2002-0969 (La.App. 07/09/02); 820 So.2d 565

PRIOR HISTORY: IN RE: Royot, Nathalie, Veronique Marty, and Celine Moguen, Applying for Reconsideration of this Court's order dated April 26, 2002.

JUDGES: Bernette J. Johnson, Catherine D. Kimball, Jeffrey P. Victory, Chet D. Traylor, John L. Weimer, CALOGERO, C.J., would grant reconsideration.

OPINION:

Denied.

CALOGERO, C.J., would grant reconsideration.

APPENDIX G -- OPINION OF THE SUPREME COURT OF LOUISIANA DATED 7/09/02 DENING REHEARING

In Re: Bourke, 2002-1468 (La. 07/09/02);820 So.2d 565

PRIOR HISTORY: IN RE: Bourke, Richard John; - Applying for rehearing of this court's action dated June 14, 2002.

JUDGES: Bernette J. Johnson, Catherine D. Kimball, Jeffrey P. Victory, Chet D. Traylor, Jeannette Theriot Knoll, John L. Weimer, CALOGERO, C.J., - would grant rehearing.

OPINION:

Rehearing denied.

CALOGERO, C.J., - would grant rehearing.

APPENDIX H – TEXT OF CONSTITUTIONAL AND STATUTORY REFERENCES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1981. - Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief

was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Art. I., Section 8.

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

* * * *

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

* * * *

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Article VI.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.